LEISURE COMPLEX SDN. BHD.

v.

MALAYSIA CREDIT FINANCE BERHAD

HIGH COURT, KUCHING
TUAN RICHARD MALANJUM JC
[SUIT NO. KG. 81 OF 1993/III]
22 SEPTEMBER 1993

LAND LAW: Sublease of charged property - Consent to sublease - Chargor subleased property to third party - Property still under charge - Chargee withheld consent - Whether withholding of consent unreasonable and arbitrary - Sarawak Land Code (Cap. 81) s. 159 - Whether plaintiff has closed its mind to giving consent.

INTERPRETATION OF STATUTES: Sarawak Land Code (Cap. 81) ss. 158, 159 - Whether s. 159 of the Code to be given broader meaning - Whether "consent" means consent which must not be unreasonably withheld - Whether s. 159 an enabling section - Whether it is a consequential section.

CONTRACT: Allegation that verbal offer of plaintiff accepted in writing by defendant - Whether offer or representation made - Whether content of letter amounted to acceptance of offer - Whether there was a binding contract.

By a Memorandum of Charge dated 13 April 1987 the plaintiff charged certain property to the defendant.The charge was executed in consideration of a certain loan granted to the plaintiff by the defendant. On 27 March 1993 the plaintiff subleased portions of the property (the demised premises) to one Ben Foods (East Malaysia) Sdn Bhd (Ben Food). The plaintiff subsequently closed down three of its businesses at the demised premises purportedly to make way for Ben Food to move in. No prior consent of the defendant, as chargee of the charged property, was obtained in respect of the sublease of the demised premises.

A meeting was held between the plaintiff and the defendant on 12 April 1993 wherein the question of the defendant's consent to the sublease, among other things, was discussed. The plaintiff alleged that a proposal cum a representation was made at this meeting by the defendant to the effect that the defendant would consent to the sublease on condition that the rentals receivable from the sublease be assigned to the defendant. This proposal, the plaintiff further alleged, was accepted by the plaintiff through a letter dated 15 April 1993 with the result that a contractual obligation arose whereby the defendant was bound to give its consent to the sublease.

The defendant refused to consent to the sublease on the ground that the monthly rental proceeds receivable from the demised premises was not sufficient to update the outstanding interest and the plaintiff filed this action and applied for the following relief:

1. An order that the defendant do specifically perform the agreement reached on 15 April 1993 and provide its consent to the registration of the Memorandum of Sublease dated 27 March 1993;
2. A declaration that the refusal by the defendant to provide its consent to the sublease was unreasonable and arbitrary; and
3. An order that the defendant do execute such documents as are necessary to enable the plaintiff to register the Memorandum of Sublease.

Held:

[1] The contents of the letter dated 15 April 1993 showed that no offer was made by the defendant to the plaintiff. Even if the alleged offer or proposal was made by the defendant and the plaintiff has accepted the proposal, such an acceptance could not result in a binding contractual relationship between the parties as such proposal, as the letter itself indicated, would only be a recommended one to the Board of Directors of the defendant.

[2] There was no representation made by the defendant at the meeting on 12 April 1993. The closure of the three businesses of the plaintiff was dictated by the plaintiff's obligation to comply with the terms of the Memorandum of Sublease and not because of any reliance upon any representation by the defendant.

[3] Section 159 of the Sarawak Land Code (Cap. 81) is a consequential section and not an enabling or permissive provision. The section does not restrict or prohibit a chargor from subleasing a charged land. He may do so but if he does that without the consent of the chargee then the sublease will not be binding on the chargee. This being the position, the reliance of the plaintiff on this section is quite misplaced.

[4] Justice demands that the Court should examine the circumstances leading to the refusal of consent. Since the defendant in this case has not entirely closed its mind to giving consent, it therefore ought to execute the necessary documents to enable the plaintiff to

register the Memorandum of Sublease provided that the plaintiff is willing and able to meet the monthly repayment of the loan and update or settle part of the interest arrears as may be agreed by the defendant.

[Plaintiffs application under prayer (c) of the Statement of Claim granted subject to aforementioned proviso].

Cases referred to:

Tajjul Ariffin bin Mustafa v. Heng Cheng Hong [1993] 3 CLJ 117 ***(refd)***

Tan Chong Hock v. Chan Thean Soo & Anor [1987] 2 MLJ 479 ***(refd)***

Dering v. Earl of Winchelsea [1775 - 1802] All ER Rep 140 at 142 ***(refd)***

Bowmakers Ltd. v. Barnet Instruments Ltd. [1944] 2 All ER 579 ***(refd)***

Abdul Malik bin Abdul Majid v. Asnah bte Hamid [1985] 2 CLJ 364 / [1985] 2 MLJ 459 ***(refd)***

Yong Nyee Fan & Sons Sdn. Bhd. v. Kian Guan & Co. Sdn. Bhd. [1979] 1 MLJ 182 ***(refd)***

Waltons Stores (interstate) Ltd. v. Maher & Anor. 76 ALR 513 ***(dist)***

W.E. Wagener Ltd. v. Photo Engravers Ltd. [1984] 1 NZLR 412 ***(cit)***

Bocardo SA v. S & M Hotels Ltd. & Anor. [1979] 3 All ER 737 ***(cit)***

Sussex Peerage 8 ER 1034 ***(refd)***

Legislation referred to:

Sarawak Land Code, ss. 158, 159

For the plaintiff - George Lo (James Lo with him); M/s. George Lo & Partners

For the defendant - Hon Salang (Libat Langub with him); M/s. Dr. Yaacob & Ismail

JUDGMENT

Richard Malanjum JC:

Introduction:

In this action the plaintiff is praying for the following relief:

(a) An order that the defendant do specifically perform the agreement reached on 15 April 1993 to wit that the defendant do provide its consent to the registration of the memorandum of sublease dated 27 March 1993 entered into between the plaintiff and Ben Foods (East Malaysia) Sdn. Bhd;

(b) Further and in the alternative, a declaration that the refusal by the defendant to provide its consent to the registration of the memorandum of sublease dated 27 March 1993 entered into between the plaintiff and Ben Foods (East Malaysia) Sdn. Bhd. was unreasonable, arbitrary and capricious;

(c) An order that the defendant do execute such documents as are necessary to enable the plaintiff to register the said memorandum of sublease;

(d) Alternatively, damages for breach of the said agreement;

(e) Alternatively, an order that the defendant is estopped from denying its said representation, to wit that it would provide its consent to the registration of the said memorandum of sublease;

(f) Alternatively, damages for breach of representation and/or misrepresentation;

(g) Interest on any award of damages at the rate of 8% per annum from the date hereof to date of realisation;

(h) Costs of this action;

(i) Such further or other relief as this Honourable Court deems just and expedient.

Briefly, the current relationship between the plaintiff and defendant is one of chargor-chargee and the dispute arose over the question of consent on a sublease of a charged property. At the commencement of this trial learned Counsel for the plaintiff applied for evidence of damages to be adduced later to which learned Counsel for the defendant did not object.

The undisputed facts:

The parties are also not in dispute over the following relevant facts, namely:

(i) that the plaintiff has borrowed money from the defendant which is yet to be settled;

(ii) that the memorandum of sublease was executed between the plaintiff and one Ben Foods (East Malaysia) Sdn. Bhd. (hereinafter called "Ben Foods") on 27 March 1993 for the sublease by Ben Foods of the ground and first floors (hereinafter called "the demised premises") of the building situated at Simpang Tiga, Tabuan, Kuching and described as Lot 7825, Section 64, Kuching Town Land District (hereinafter called "the property") for the period stated therein;

(iii) that the property is charged to the defendant *vide* a memorandum of charge dated 13 April 1987 and registered as Instrument No. L 3487/1987 on 16 April 1987 for the sum of RM2,000,000; and

(iv) that there was a meeting held on 12 April 1993 in Kuching (hereinafter called "the 12 April 1993 meeting") between the General Manager of the plaintiff, Mr. Chan Hiok San (PW1) and Puan Sarah Abdul Latiff, (DW2) an officer of the defendant based at its Head Office in Kuala Lumpur and one Encik Daud Abdul Aziz, an officer at the Kuching branch of the defendant.

The issues:

On the evidence adduced and submissions of the respective learned Counsel for the parties before this Court I am of the view that the determination of the following issues are relevant before coming to a decision in this case. They are:

(1) whether there was an agreement concluded between the plaintiff and the defendant arising from the 12 April 1993 meeting and the subsequent letter dated 15 April 1993 of Mr. Chan Hiok San (PW1) to the Branch Manager of the defendant in Kuching;
(2) whether there was any representation made by the defendant to the plaintiff during that 12 April 1993 meeting which the defendant must be estopped from refusing to fulfil; and
(3) whether the refusal of consent by the defendant to the sublease was unreasonable and arbitrary thereby entitling the plaintiff to seek for a declaration.

I shall deal with each issue separately with reference to the evidence adduced and the relevant principles of law.

Issue (1)

This issue is substantially a question of fact. I will therefore proceed to examine the versions of both parties and the implications and inferences that may be derived thereof in determining this issue.

(i) Plaintiff's version:

It was the contention of the plaintiff that there existed an agreement arising from the 12 April 1993 meeting and the subsequent letter of the plaintiff dated 15 April 1993. The plaintiff said that on the 12 April 1993 meeting Puan Sarah Abdul Latiff (DW2) made an offer which was accepted by the defendant *vide* its said letter dated 15 April 1993. The plaintiff contended as such on the basis of what its General Manager, Mr. Chan Hiok San (PW1) had testified. What therefore actually transpired during the 12 April 1993 meeting? It was the testimony of PW1 that on 12 April 1993 he met Puan Sarah Abdul Latiff (DW2) together with Encik Daud Abdul Aziz in his office. The meeting lasted for about half an hour. PW1 said that during the meeting he asked DW2 whether the defendant had given its consent and was told that it had not due to some other matters. According to PW1, DW2 insisted that the plaintiff settle the outstanding accounts before consent could be given by the defendant. PW1 also said that despite being told that the Branch Manager Encik Wan Abdul Rahman (DW1) had already agreed and sent the document pertaining to consent to Kuala Lumpur, DW2 maintained her stand. Subsequently however without any explanation or reason for the change of attitude of DW2, PW1 said and I quote:

> But finally she agreed that if we can assign the whole rental from Ben Food to the defendant then the defendant will give its consent and at the same time withhold any legal proceeding against Leisure Complex for the time being until we come to an amicable settlement on the other outstanding matters. I told her that if that was what she wanted then I have to refer to my superior Mr. Huang Ee Hoe as I cannot decide.

PW1 also stated that the plaintiff was reluctant to assign the rentals to the defendant as it was looking forward to receive them since the plaintiff had to close three businesses in return for the income.

It was also the evidence of PW1 that DW2 told him that the consent had to be signed by two of the directors of the defendant. PW1 further testified that DW2 told him that once he obtained the confirmation on the assignment of the rentals the plaintiff should write in the form of a recommendation to the Board of Directors of the defendant as a matter of formality and internal procedure. PW1 then said that he referred the matter to Mr. Huang Ee Hoe who agreed to the assignment two days later after being asked. Subsequently PW1 said that he wrote a letter to the defendant on 15 April 1993. For convenience it may be appropriate to reproduce the said letter in this judgment.

> Our Ref: LC/FIN/88/15 (4229)
>
> 15 April 1993
>
> By Fax/By Hand
>
> Branch Manager
> Malaysia Credit Finance Berhad
> No 10, Lot 552,
> Cheema Building
> Jalan Palm
> 93400 Kuching
> Sarawak
>
> Attn: Encik Wan Abdul Rahman Wan Abu Bakar
>
> Dear Sir
>
> Re: 1. Revolving Credit Facility of RM2.0M Leisure Complex Sdn. Bhd.

2. Term Loan of RM4.2M - Task Force Management Sdn. Bhd.

We refer to the meeting between your Puan Sarah Binti Abdul Latiff and Encik Daud Bin Hj Abdul Aziz and the undersigned at our office in Kuching on 12 April 1993.

During the meeting your Puan Sarah has made the following proposal for recommendation to your Board:

(i) That Malaysia Credit Finance Berhad will execute the consent of chargee as per our letter to you Ref. LC/PIN/88/15 (4222) dated 6 May 1993; and
(ii) That Malaysia Credit Finance Berhad will withhold taking any legal action on the above loan accounts for the time being until we can work out an amicable settlement to resolve the outstanding matters between us;

Provided That the monthly rental receivable from the sublease of the ground and first floors of the King's Leisure Complex totalling RM16,328 per month be assigned to Malaysia Credit Finance Berhad with effect from 1 July 1993 as part payment towards the settlement of the above loan accounts.

To show our sincerity in resolving the outstanding matters between us, we are agreeable to your above proposal.

We look forward to receiving your favourable reply soon.

Thank you.

Yours faithfully,

(Sgd)
CHAN HIOK SAN
General Manager

c.c. Malaysia Credit Finance Berhad
Kuala Lumpur
Attn: Puan Sarah Abdul Latiff

This letter was marked as "CHS-7" in the affidavit of PW1 affirmed on 6 July 1993 which was admitted as Ex. P1. I shall therefore refer the said letter as CHS-7 hereinafter.

PW1 said that CHS-7 was sent to the defendant on the 15 April 1993 but received no immediate response. Accordingly he telephoned DW2 on four occasions pertaining to CHS-7. The first time he telephoned was on 16 April 1993 only to be told by DW2 to check with her again in the first week of May 1993 as one of the directors of the defendant was away. The next two calls, on 8 May 1993 and 11 May 1993 respectively produced no result. PW1 said that DW2 told him that the director concerned of the defendant was either busy or not in the office. Then on 19 May 1993 PW1 called DW2 again and he was told to wait for a letter from the defendant. PW1 said that in all the four calls DW2 did not deny the truth or accuracy of CHS-7. Subsequently PW1 said that the plaintiff received two letters from the defendant refusing to give its consent to the sublease. After consulting its solicitors PW1 said that the plaintiff wrote a letter to the defendant on 15 June 1993 of which no response from the defendant was ever received.

PW1 also admitted that it was only on 15 June 1993 that he wrote to Ben Foods regarding the difficulty in getting the consent to the sublease. His explanation for the delay was that he thought there was no problem in getting the consent.

Under cross-examination in particular on the 12 April 1993 meeting by learned Counsel for the defendant PW1 replied as follows, in summary:

(i) that he did not inform Ben Foods that the property was charged to the defendant during the successful negotiation in November 1992;
(ii) that DW2 told him that if the plaintiff could settle the outstanding accounts the defendant would give its consent and at the same time withhold any legal proceeding against the plaintiff for the time being until an amicable settlement has been reached;
(iii) that the condition in giving consent was that the plaintiff had to settle the outstanding loan accounts;
(iv) that CHS-7 was drafted in that form as DW2 requested him to do so;
(v) that DW2 did not ask him to put the phrase 'we look forward to receiving your favourable reply soon' in CHS-7;
(vi) that no deed of assignment of rentals was prepared after 15 April 1993 and there was no discussion on it between the plaintiff, the defendant and Ben Foods;
(vii) that PW1 expected the defendant to sign the consent form without first knowing the terms of the proposed deed of assignment. He expected the lawyers of the defendant namely, M/s. Dr. Yaacob & Ismail to prepare the deed of assignment as the previous documents were prepared by the said legal firm;

(viii) that as the memorandum of sublease was already signed in March 1993 the plaintiff was obliged to close down the three businesses and regardless of what DW2 would have said in April 1993 the plaintiff had already committed itself in March 1993;

(ix) that he considered himself a prudent businessman;

(x) that he disagreed that DW2 ever told him that the Plaintiff had to assign the rentals and either update the outstanding accounts or reschedule the loan as the monthly rental alone was insufficient;

(xi) that he disagreed that the plaintiff owed the defendant in the sum of about RM1,731,205.87 and that the interest alone per month as of September 1991 was nearly RM16,000;

(xii) that the plaintiff would pay if it could agree on the sum outstanding;

(xiii) that he knew that the plaintiff had to deal directly with the defendant's Headquarters in Kuala Lumpur and not the Kuching Branch; and

(xiv) that PW1 agreed that whatever approval required it had to be obtained from or with the consent of the defendant's Headquarters and not the Kuching Branch.

But on re-examination PW1 said, *inter alia*, that regardless of the fact that the plaintiff had signed the memorandum of sublease in March 1993 he would have informed Ben Foods immediately if the plaintiff knew in April 1993 that it could not get the consent to the sublease and in such circumstance he would not have closed down the three businesses.

Defendant's version:

It was the contention of the defendant as testified by DW2 (Puan Sarah Abdul Latiff) that what the plaintiff said, in particular by PW1, was not accurate.

In her evidence DW2 said that she did visit PW1 on 12 April 1993 and during that visit PW1 brought up the issue of consent to the sublease. In reply she asked PW1 what would be the consideration for the defendant in return for giving consent. When PW1 offered the monthly rental of RM16,000, DW2 said that she told him that the sum was not enough to pay the arrears. According to DW2 she therefore suggested to PW1 to restructure the loan and to assign the other rentals of the other lots as well. But PW1 told her that no rentals were collected for the other lots as the tenants were the subsidiaries of the plaintiff.

DW2 also testified that when she left the meeting it was with the understanding that PW1 would write to the defendant with the following proposals and subject to the decision of the management of the defendant, *viz.*:

(i) that the plaintiff was to assign the rentals of RM16,000; and

(ii) that the loan was to be restructured.

Nothing was further said about the consent. She also said that PW1 did not respond immediately to her suggestion but replied that he would discuss the matter with Mr. Huang Ee Hoe first. DW2 was also positive that there was no discussion on withholding of legal action during that meeting.

When asked about the memorandum of sublease DW2 said that on 12 April 1993 she did not know of its execution as PW1 did not tell her. As regards to CHS-7 DW2 said that her Manager, after discussion with her, decided to refer it to the General Manager (Credit) and to the Chief Executive Officer of the defendant. But the matter was not settled after the meeting with the General Manager (Credit) and the Chief Executive Officer. It was decided to refer it to the Executive Director who was away at that time.

DW2 also explained that the General Manager (Credit) and the Chief Executive Officer could not make a decision on the matter as they did not form the quorum of the Non-Performance Loans Committee which composed of the Executive Director, the Chief Executive Officer, the General Manager (Credit) and the Manager of the Remedial Management Unit. Further, DW2 stated that the Executive Director had a personal interest on the loan of the plaintiff due to its magnitude and being long outstanding and unpaid. For that reason (and pending a decision of the Non-Performance Loans Committee) DW2 said that no reply was given to CHS-7 immediately. On 10 May 1993 there was a meeting of the said Committee when other non-performing loans were also discussed and DW2 testified that she presented CHS-7 orally.

Under cross-examination, DW2 was referred to CHS-9 of Ex. P1 which was a letter from the defendant to the plaintiff refusing to grant the

consent to the sublease. The said CHS-9 reads and for clarity I reproduce it in full as follows:

Your Ref: LC/FIN/88/15 (4229)

Our Ref: MCF/FLS/001/KUC &
MCF/RC/001/KUC

18 May 1993

Task Force Management Sdn. Bhd.
('Task Force'),
Leisure Complex Sdn. Bhd. ('Leisure'),
25-28, Third Floor,
Block C, King's Centre,
Jalan Simpang Tiga,
93300 Kuching.

Attn: Mr. Chan Hiok San

Dear Sirs,

Re: 1. Term Loan of RM4.2M
2. Revolving Credit Facility of RM2.0M

With reference to your letters of 6 and 7 April 1993 (addressed to our Kuching branch), we regret to inform that our management is not agreeable to grant our consent as chargee to sublease the property held under Lot 7825 Section 64, Kuching Town Land District.

We are not agreeable to the sublease as the monthly rental proceeds of RM16,328 is insufficient to update the interest outstanding of both the facilities.

As such, please take notice that unless the sums of RM4,154,692.42 derived as follows:

Facility	Interest outstanding @ 28 February 1993
1. Term Loan of RM4.2M	RM3,084,144.02
2. Revolving Credit of RM2.0M	RM1,070,548.40
	RM4,154,692.42

are paid to us within ten (10) days from date hereof we will have no other alternative but to proceed with legal actions to recover the amounts owing to us. In such an event, all costs and expenses incidental thereto shall be borne and paid by your goodself.

Thank you

Yours faithfully,
Malaysia Credit Finance Berhad

(Sgd.)
Ungku Abd. Nassir Ungku Abd. Rahman
Manager
Remedial Management Unit

c.c. 1. Mr. Huang Ee Hoe
2. Our Kuching Branch

DW2 agreed that the reason given in CHS-9 was different from that was stated in paragraphs 30 and 33 of Ex. D1, (the affidavit of DW2 affirmed on 27 July 1993). For convenience paragraphs 30 and 33 are reproduced herein as follows:

> 30. I deny that the defendant's decision to refuse consent is either arbitrary or unjustified as the effect of a sublease over the said property will be to create an encumbrance over the land which will reduce its market value or at least its marketability in a forced sale situation.
>
> 33. Further, I am advised by my solicitors and verily believe that the balance of convenience lies in favour of the defendant as the defendant will now wish to realise their security over the land in view of the plaintiff's continuing default. As such, the defendant will face difficulty in selling the land to a third party if the same is encumbered by a sublease.

DW2 also replied that the defendant always had the intention to commence legal action against the plaintiff even in March 1993.

DW2 further disagreed with learned Counsel for the plaintiff that she asked PW1 to prepare CHS-7 in such a form or manner. It was also put to her to which she disagreed that she made the offer to the plaintiff on 12 April 1993 whereby consent would be given in exchange for the assignment of rentals from Ben Foods. DW2 maintained that she left the 12 April 1993 meeting with the understanding as stated by her earlier on during her evidence in chief and that was also her reason for not making any terms for the proposal to restructure the loan up to-date. She also said that during that meeting she was told by PW1 that he had to revert to Mr. Huang Ee Hoe first.

DW2 further stated that during the 12 April 1993 meeting she only proposed to the plaintiff to restructure the loan whereas the proposal to assign the rentals came from PW1. And upon return from Kuching she (DW2) prepared the action plan (pp. 132 & 133 of "C") before CHS-7 was received.

DW2 was also questioned on her authority, expressed or implied, as an officer of the defendant with particular reference to paragraph 20 of Ex. D1 which reads as follows:

> 20. I then informed them that their proposed assignment of sublease rentals was insufficient to meet the monthly interest repayments presently due and as such, the

defendant would not be prepared to consider giving their consent to the sublease unless some further payment was ensured or some proposal to restructure the loan was forthcoming.

Her reply was that she had no authority to accept or reject the proposal of the plaintiff and that was why the proposal of the plaintiff was referred to the Non-Performance Loans Committee aside from wanting to be fair to the plaintiff. DW2 also explained that paragraph 20 of Ex. D1 reflected her action as a banker and to enable the plaintiff to present a better picture of the proposal on assignment of rentals to the Non-Performing Loans Committee. DW2 further said that she was not the most involved in the negotiations with the plaintiff. She took care of the correspondence.

This witness disagreed that it was reasonable for the plaintiff to assume that she had authority to negotiate on the consent for the sublease on the basis of her involvement with the proposed sale of the vacant land of the plaintiff in Kuching. DW2 said that she only perused the proposal.

As to the inaction over the content of CHS-7 DW2 agreed that nothing was done immediately upon receipt to correct any inaccuracy and misrepresentation therein. But she disagreed that the reason for such an attitude was that there was no inaccuracy and misrepresentation in the first place. On this point in reply to a question from the Court this witness said that she did not think at that time to send a letter of denial immediately upon receipt of CHS-7.

However, in the evidence of DW3 he stated that DW2 did mention to him whether they should immediately reply CHS-7 but he told her that the decision of the Non-Performing Loans Committee should be sought in view of the fact that the said letter stated that DW2 had made a proposal for recommendation to the Board of the defendant. DW3 also said that DW2 was expected to review the proposal and to comment and to make recommendation to the Non-Performing Loans Committee for its decision whether to accept or reject the proposal, thus explaining further why no earlier response was made to CHS-7. This witness also reasoned that the delay in replying to CHS-7 was due to its own content. DW3 said that CHS-7 did not state that it required an urgent reply but was only looking forward to a favourable reply.

Findings:

In coming to my finding on this issue (1) I bear in mind that the plaintiff is not relying on any of the statements of DW1, Wan Abdul Rahman, to seek for any relief from this Court. Learned Counsel for the plaintiff said that the evidence of DW1 was for background facts leading to the oral agreement upon which the claim of the plaintiff was based.

I have also taken note that in examining and considering the evidence adduced by both sides in the light of decided authorities "the most scrupulous attention must be paid to the facts of previous cases cited to the Court. This requirement is the anchor sheet of the doctrine of precedent according to which like cases must be decided alike. And so, the probability that a Court will decide a particular case in the same way as would the Court which decided one of the cases cited will become less and less as the difference between the facts of the two cases increase" per Edgar Joseph Jr. SCJ in *Tajjul Ariffin bin Mustafa v. Heng Cheng Hong* [1993] 3 CLJ 117 at p. 125 g.

Further, I have reminded myself of the generally accepted approach, namely, that my decision will depend on the credibility of the parties. But credibility does not depend solely on demeanour but is to be balanced against the other evidence and the probabilities of the case and the 'possibility of judges being deceived by adoit or plausible knaves or by apparent innocence' [see: *Tan Chong Hock v. Chan Thean Soo & Anor*. [1987] 2 MLJ 479].

Having heard the evidence adduced in this case as a whole it is my finding on a balance of probabilities that the version of the defendant is the probable and credible one and I believe and accept it in respect of this issue (1). In coming to such a finding I have considered besides the demeanour of the witnesses from both sides while in the witness box such factors, namely:

(a) The content of CHS-7 itself on literal reading defeats the version of the plaintiff. Except for what PW1 had said, to wit, that CHS-7 was written in such a form on the request of DW2 (which DW2 denied), there was no other direct allegation or evidence indicating that was the case. On the other hand PW1 agreed that the last sentence therein was his. In my view PW1 was in fact in control of what he was writing. The

subsequent conduct of PW1 was also not consistent with his averment. After failing to receive a quick reply from the defendant surely PW1 could have indicated the true state of affairs by a subsequent letter to the defendant or DW2 as a matter of urgency since the sub-lease was to start on 1 May 1993. Instead, as PW1 stated, he only called up. And looking at the short time spent on those telephone calls they do not reflect in my view any discussion let alone any argument. I do not therefore believe that CHS-7 was the dictate of DW2. And that being my finding I do not see how CHS-7 can be the basis to say that the plaintiff has accepted an offer of the defendant. In short, CHS-7 deals with the 12 April 1993 meeting whereby it is clearly stated that DW2 has made **'the following proposal for recommendation to your Board'** (emphasis added). Thus on a literal reading of this emphasised phrase it is obvious that there was no offer made by DW2. It is plain common sense in my view that DW2 could not have made any offer since the Board of Directors of the defendant would still have to decide as indicated in CHS-7. Anyway, even if the plaintiff agreed and accepted the proposal made by DW2 I do not think such an acceptance could result in a binding contractual relationship between the parties as such proposal at most would only be a recommended one to the Board of the defendant as indicated in CHS-7 itself;

(b) PW1 himself said that DW2 at the beginning of the 12 April 1993 meeting stipulated the requirements of the defendant, namely, for the plaintiff to settle the outstanding accounts first. But having said that, PW1 then said that DW2 finally agreed to accept the assignment of the rentals in return for the consent and at the same time the defendant would withhold action against the plaintiff. If there was any truth in such a statement by PW1 there was no explanation given by him which led to such a change of attitude or stand by DW2. My finding however is that it is highly improbable and I believe DW2 that such a change did not take place as the monthly rental by itself would not be enough to cover the interest repayment;

(c) There was inconsistency in the evidence of PW1 relating to the commitment of the plaintiff to Ben Foods. Under cross-examination he said that as the memorandum of sublease was already signed in March 1993 the plaintiff was obliged to close down the three businesses and regardless of what DW2 said or would have said in April 1993 the plaintiff was already committed in March 1993. But in re-examination PW1 said that regardless of the fact that the plaintiff had already signed the memorandum of sublease he would have informed Ben Foods immediately if the plaintiff knew that it could not get the consent to the sublease and in such a circumstance he would not have closed down the three businesses. Obviously PW1 appeared to be only interested in painting the best picture he possible could without realising the consequence. Indeed such an indifferent attitude has positioned the plaintiff to where it is today. While claiming to be fully aware of the requirement of consent to sub-lease from the defendant, PW1 assumed such a matter to be a simple one. And without any hesitation he said that the plaintiff wanted to keep the rentals for itself knowing well of the non-performance of the plaintiff on the loan with the defendant. In fact on examination of the memorandum of sublease ("CHS-2" of Ex. P1) I found no clear provision that the interest of the defendant had been taken into account when it was executed thereby in breach of the clear provision of Section 9.01 (g) of the memorandum of charge dated 13 April 1987 ("SAL-5" of Ex. D1). Such a breach and conduct are elements to be considered in a Court of equity assuming for a moment that I believe the version of PW1 [see: *Dering v. Earl of Winchelsea* [1775 - 1802] All ER Rep 140 at 142; *Bowmakers Ltd. v. Barnet Instruments Ltd.* [1944] 2 All ER 579; *Abdul Malik bin Abdul Majid v. Asnah bte Hamid* [1985] 2 MLJ 459]. If not for the requirement of the Land Office, infringement of the said Section 9.01 (g) would have gone unchecked with the full knowledge of PW1. However, now that he is caught by his own improper scheme I am of the view that he is utilising every means to extricate himself from the inevitable consequence, namely, the pain of liability.

Further, PW1 said that he would not have closed the three businesses if he knew that there would be no consent. But after being

informed by the defendant on 19 May 1993 the plaintiff still went on to close one of the businesses on 26 May 1993. Moreover, PW1 claimed that he would have informed Ben Foods immediately of the difficulty of getting consent in April 1993 if the defendant told him. Yet after being told on 19 May 1993 PW1 did not inform Ben Foods until 15 June 1993 without any good reason given. His only reason was that he thought that was no problem in getting the consent;

(d) It would also in my view be against common sense and business practice if the defendant were to execute the consent document purely on the strength of CHS-7 even assuming that PW1 was correct in his version. I found no justification as well from the evidence adduced by the parties that the defendant was obliged to sign the consent document even before any document or terms thereof on the assignment of rentals could be prepared. The situation was aggravated by the fact that the loan of the plaintiff with the defendant had long been outstanding and it was not in dispute that the plaintiff had not been paying it;

(e) Learned Counsel for the plaintiff submitted that the meeting of PW1 with DW1, Wan Abdul Rahman, and what transpired thereof lent credence to the plaintiff's case and at the same time pointed to the manifest deficiencies of the defendant's case. But as admitted by learned Counsel for the plaintiff the case for the plaintiff did not rest on the meeting between PW1 and DW1. Thus I do not find much assistance arising therefrom.

This is particularly so when DW1 in his evidence said that he told PW1 that the Kuching Branch had no authority in dealing with consent and that PW1 had to deal with the Head Office of the defendant. Indeed PW1 under cross-examination agreed that subsequent to SAL-7 of Ex. D1 he dealt with the Head Office of the defendant;

(f) Learned Counsel for the plaintiff also contended that logically the request for the rentals must have come from DW2 during the 12 April 1993 meeting. In view of my earlier finding as to which side I believe I do not think this contention remains valid. Further, PW1 must have been well aware on the requirement of rentals assignment as DW1 said in his evidence that that was suggested to PW1. Thus, it is also quite logical to say that when DW2 suggested restructuring of the loan PW1 could have spoken on the rentals assignment;

(g) Next, the learned Counsel for the plaintiff went to a great length on the effect of the inaction of the defendant in particular DW2 in relation to the content of CHS-7. If CHS-7 is to be read on the basis that DW2 did make an offer to PW1 and that its content was merely done as a formality then perhaps there is some effect on such inaction of DW2 or the defendant. But on the basis of my earlier finding that DW2 could not have made any offer to PW1, the content of CHS-7 on its own does not call for an immediate response or denial. The very content of CHS-7 does not require a reply until the Board of Directors of the defendant has made a decision. Thus I do not find any merit on the point of silence or inaction in replying or responding to CHS-7. As stated earlier on in this judgment if at all anyone has to react it should have been PW1 if it was true that DW2 had made an offer as alleged. PW1 should have followed it up disclosing the true situation upon failing to get an early reply or response from the defendant;

(h) As for the contention that CHS-7 might not have been discussed by the Non-Performing Loans Committee as the minutes (p. 131 of "C") did not make any reference to it, I find that the explanation given by DW2 and DW3 is acceptable and reasonable. I therefore find no merit in this contention;

(i) On the issue of authority of DW2 to make the alleged offer, such issue is relevant only if it is found that DW2 has infact made such an offer. However in view of my earlier finding such issue becomes immaterial. Further, CHS-7 clearly defeats any claim of authority attributed to DW2, expressed or implied;

(j) The reason given in CHS-9 appears to be different from those given in paragraphs 30 and 33 of Ex. D1 but those paragraphs should be read and understood in a different context. They were addressing the issues on arbitrary or unjustified withholding of consent and on the balance of

convenience in relation to an application for an injunction. Those reasons in the said paragraphs can in my view be taken as supplementary to the reason given in CHS-9 and not as being inconsistent with each other. I find therefore that this point does not raise any adverse inferences against the defendant; and

(k) From the evidence of DW2 and DW3 regarding the delay in responding to CHS-7, they seem to be in conflict especially in the reply of DW2 to the question from the Court. However after careful consideration of the evidence of DW2 and DW3 on this point and having regard to the sequence of events as related by them after the receipt of CHS-7 I find that what appears to be a conflict is not as such as to affect the credibility of DW2. And even assuming that the evidence of DW2 on this point is inconsistent with that of DW3 I do not consider such inconsistency a major one having regard to her overall evidence and the explanation of the event by DW2 and DW3.

It is therefore my conclusion that the answer to issue (1) must necessarily be in the negative.

Perhaps it is appropriate here to recall what his Lordship Chang Min Tat FJ said in *Yong Nyee Fan & Sons Sdn. Bhd. v. Kian Guan & Co. Sdn. Bhd.* [1979] 1 MLJ 182 at p. 194 G (Right):

> It is settled law that the Court will not impute a legal relationship on the strength of what one party thought of the matter, where there was no intention whatsoever to create such a relationship.

Issue (2)

In view of my conclusion on issue (1) it follows that the answer to this issue is also in the negative having considered the evidence adduced. I am of the view that on a balance of probabilities no representation was made by the defendant to the plaintiff during the 12 April 1993 meeting.

Learned Counsel for the plaintiff submitted that as a result of the representation of the defendant to the plaintiff, the plaintiff relied on it thereby having to close down the three businesses and allowing Ben Foods to make the preparation to move to the demised premises thus exposing the plaintiff to liability. But such contention in my opinion is contradictory to what actually happened. The closure of the three businesses could not have been avoided as PW1 testified under cross-examination that the plaintiff had already committed itself upon signing the memorandum of sublease. Such a statement was consistent with what actually happened when, even after being told of the refusal of consent, the plaintiff proceeded to close down the roller skating rink on 26 May 1993. Further, as a prudent businessman and knowing well that consent was yet to be given by the defendant it would have been only logical, if ever there was such a representation made by DW2, that the plaintiff either should not have closed the businesses or to inform the defendant of what it was intending to do in reliance to such an alleged representation. However in the instant case nothing of that nature was done by the plaintiff. And my conclusion is that the most probable reason must be that the plaintiff has found itself obliged to comply with the terms of the memorandum of sublease and not as alleged by it.

Learned Counsel for the plaintiff also submitted that the plaintiff would have informed Ben Foods immediately of the difficulty in getting consent if the defendant said so in April 1993. This contention is also hollow because when the plaintiff was informed subsequently of the refusal of consent on 19 May 1993 the plaintiff only informed Ben Foods on 15 June 1993. Further, such a contention is contrary to the admission of PW1, to wit, that as of 27 March 1993 after the execution of the memorandum of sublease the plaintiff has already committed itself to Ben Foods.

The case of *Waltons Stores (interstate) Ltd. v. Maher & Anor.* 76 ALR 513 was cited by the learned Counsel for the plaintiff to support his contention on this issue (2). I have considered that case. In my view that case would have been helpful to the plaintiff but for the facts in this present case. In *Waltons Store's* case there was no third party involved whereby the respondent thereof was committed or obliged by virtue of an agreement. It was substantially between the two parties and further the appellant allowed the respondent to proceed with the demolition work and up to 40% of the construction of the new building. In the present case however the plaintiff has already committed itself to Ben Foods as of 27 March 1993. This has been clearly admitted by PW1 under cross-examination. Thus, the question of encouragement, reliance or belief in my view does not arise.

Issue (3)

This issue calls for the interpretation of s. 159 of the Sarawak Land Code (Cap. 81). For convenience s. 159 reads:

> No sub-lease of charged land shall be binding upon the chargee except so far as he has consented thereto.

Learned Counsel for the plaintiff submitted that the section must be given a wider meaning for it to make any sense at all. As such, learned Counsel said that the word 'consent' in that section must mean consent which cannot be unreasonably withheld. Further, to hold otherwise as learned Counsel submitted, would render s. 158 of the same Code ineffective and meaningless. Section 158 of the Land Code reads:

> When any land is intended to be sub-leased for any term exceeding one year, the proprietor and the sub-lessee shall execute for the purpose of registration a memorandum of sub-lease in Form L in the First Schedule, which memorandum shall give such description of the land as may be necessary to identify the same and shall refer to any entry in the Register relating thereto. Any such sublease may also include an agreement by the sub-leasee that he will insure and keep the property insured against loss or damage by fire and also such other conditions as may have been agreed to by the parties.

Learned Counsel argued that since most developed, especially commercial properties, would usually have been charged to financial institutions it would make s. 158 meaningless if a chargee could arbitrarily and unreasonable withhold consent to sub-lease. The cases of *W.E. Wagener Ltd. v. Photo Engravers Ltd.* [1984] 1 NZLR 412 and *Bocardo SA v. S & M Hotels Ltd. & Anor.* [1979] 3 All ER 737 were cited in support of his argument.

Bearing in mind that Courts are only to interpret statutory provisions (see: *Sussex Peerage* case 8 ER 1034) and on careful reading of s. 159 it is apparent that s. 159 is not an enabling or permissive provision. It is a consequential section and therefore the reliance of learned Counsel on it is quite misplaced. Section 159 does not restrict or prohibit a chargor from sub-leasing his charged land. He may do so. But if he does it without the consent of the chargee then the sublease will not be binding on the chargee. Thus the two cases cited in my view are not helpful to the plaintiff. Those cases involved the interpretation of the relevant sublease or assignment clauses in lease agreements with reference to the specific enabling or permissive statutory provisions.

Accordingly, the inevitable conclusion on this issue (3) on its own is that it has no merit.

Conclusion:

Be that as it may, justice of this case demands that I should examine the circumstances leading to the refusal of consent.

PW1 testified to the effect that the assignment of the rentals should be the only condition in exchange for the consent and the withholding of proceeding against the plaintiff by the defendant. However, DW2 and DW3 said that the assignment of rentals alone would not be sufficient even to pay the monthly interest which was nearly RM16,000 per month as of September 1991 let alone the arrears. And DW2 went on to say that if the plaintiff "had agreed to give a little bit more or to top up the proposed assignment it would have presented a better picture to our Non-Performing Loans Committee". She also said that in her action plan (pp. 132 and 133 of "C") the plaintiff was anticipated to agree on restructuring of the loan and assignment of rentals. As for DW3 he testified that the Non-Performing Loans Committee decided not to grant the consent because and I quote:

> (i) the condition to update or settle part of the interest arrears has not been put forward; and
> (ii) the rental from this sublease which is proposed in insufficient to service the monthly interest of the loan itself. The interest per month at that time on the loan outstanding was RM22,000. The total loan outstanding on the principal alone was already close to RM1 million at that time and if together with interest the total was RM2 million estimated.

DW1 also stated in his evidence that he initially asked PW1 if the plaintiff could assign to the defendant all its rentals and that of the 10 units of shophouses owned by Task Force Management Sdn. Bhd. and with upfront payment of RM200,000. When PW1 replied that the plaintiff could not afford that, DW1 asked him if the plaintiff could pay upfront RM100,000. Again PW1 said that the plaintiff could not afford it.

Having considered the evidence of DW1, DW2 and DW3 on this point I do not think that the

defendant has entirely closed its mind to giving consent. If it has done so I would have no hesitation to say that its refusal has been unreasonable. Should I therefore grant the prayer (c) asked for by the plaintiff in the interest of justice? I think so **provided** the plaintiff is willing and able to meet the monthly repayment of the loan and update or settle part of the interest arrears as may be agreed by the defendant.

The plaintiff no doubt can say that the loan with the defendant is a subject matter of a pending Court action. But in my view that is not relevant here and should not be taken into consideration without more in coming to a decision in this case.

I therefore only grant the order as prayed for under prayer (c) of the statement of claim subject to the proviso aforementioned.

In view of the nature of my order I think it is appropriate that each party pays its own costs.

PUBLIC PROSECUTOR

v.

LIM BOON HIENG @ LIM BOON SIANG

HIGH COURT, KUCHING
TUAN RICHARD MALANJUM JC
[CRIMINAL APPEAL NO. KG. 37 OF 1992/III]
8 SEPTEMBER 1993

CRIMINAL LAW: Charge under s. 4(b) Prevention of Corruption Act 1961 - Appeal on acquittal by Sessions Court - Cash paid to agent of government - To refrain from taking action for operating tug boat without valid licence, complete ship equipments and employing a juragan without trade certificate - Offence under Merchant Shipping Ordinance - Whether ownership of tug boat proved - Whether prosecution required to prove offence actually committed - Appeal against acquittal.

The accused was charged for giving cash of RM120 to a government agent as inducement to refrain from taking action against accused for offence under the Merchant Shipping Ordinances. A tugboat was stopped by the police on suspicion of offence under the Ordinance. The crew of the tugboat were given to produce the licence from where it was thought to be kept but failed to do so. The accused turned up and identified himself as the "Towkey" and in the process of inspection by the police the accused went up to PW6 a police lance corporal and offered money twice.

At the end of prosecution case the Sessions Court called for the defence and ruled that PW6 was an agent of the Government of Malaysia, it was established RM120 was given to PW6 by the accused and thus presumed under s. 14 of the PCA 1960 to be given corruptly. There was sufficient evidence to infer corrupt motive of accused and that the tugboat of the accused was inspected by the police earlier before the accused turned up as the "Towkey".

The defence was one of denial. The Sessions Court at the end of the trial took the ownership of the tugboat and giving of the money as issues in dispute. The Sessions Court concluded that the prosecution had not proven beyond reasonable doubt that the accused was the owner of the tugboat and that if that was so the accused could not be charged for the offence under the Merchant Shipping Ordinance. The Sessions Court then acquitted the accused.